No. 305

AUG 25 1958

JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

October Term, 1958.

No.

GEORGE HUSS,

Petitioner.

v.

FRANCIS R. SMITH, Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

No.

RUSSELL HUSS,

Petitioner.

v.

FRANCIS R. SMITH, Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

No.

WESLEY HUSS,

Petitioner.

v.

FRANCIS R. SMITH, Collector of Internal Revenue for the First District of Pennsylvania,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

WALTER STEIN,
1220 Philadelphia Saving Fund Bldg.,
12 South 12th Street,
Philadelphia 7, Pa.

LEON H. KLINE,

Attorneys for Petitioners.

Of Counsel:

BERGER AND GELMAN.

International, 711 So. 50th St., Phila. 43, Pa.

INDEX.

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	3
Statutes and Regulations Involved	3
Statement of the Case	4
A. The Facts	4
B. Decisions of the Courts Below	5
C. Petitioners' Position	6
Reasons for Granting the Writs	8
1. The Decision of the Court of Appeals Is in Conflict With the Decisions of This Court	8
2. The Decision of the Court of Appeals Is in Conflict With the Decisions of the Court of Appeals for the Fourth Circuit	10
3. The Issues Presented Are Significant to the Development of the Revenue Laws and to the Mining Industry	12
Conclusion	13
Appendix A—Internal Revenue Code of 1939, Sec. 23(m), Sec. 23 (n), Sec. 114(b)(4)(A), and Treasury Regulations 111	15
Appendix B—Opinion	18
Appendix C—Judgments	22
Appendix D—Opinion Sur Petition for Rehearing	25
Appendix E—Order Denying Petition	30
Appendix F—Opinion in Parsons, et al. v. Smith	31
Opinion on Petition for Rehearing in Parsons, et al. v. Smith	38

TABLE OF CASES CITED.

	Page
Burton-Sutton Oil Co., Inc. v. Commissioner, 328 U. S. 25 (1946)	6, 8, 9
Commissioner v. Gregory Run Coal Co., 212 F. 2d 52 (1954), cert. denied 348 U. S. 828	10
Commissioner v. Hamill Coal Corp., 239 F. 2d 347 (1956)	10, 11
Commissioner v. Mammoth Coal Co., 229 F. 2d 535 (1955), cert. denied 325 U. S. 824	10
Commissioner v. Southwest Exploration Co., 350 U. S. 308 (1956)	6, 8, 9
Kirby Petroleum Co. v. Commissioner, 326 U. S. 599 (1946)	8
Palmer v. Bender, 287 U. S. 551 (1933)	8
Weirton Ice and Coal Co. v. Commissioner, 231 F. 2d 531 (1956)	10, 11

TABLE OF STATUTES AND AUTHORITIES CITED.

	Page
67 Cong. Rec. 3561-78	12
H. R. Rep. No. 1, 69th Cong. 1st Sess., p. 6, 1939-1 (Part 2) Cum. Bull. 319	12
Internal Revenue Code of 1954, 26 U. S. C. Sections 611(a), 613	12
Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.):	
Section 23(m)	3, 8
Section 114(b)(4)	3, 8
Sen. Rep. No. 617, 65th Cong. 3d Sess., 1939-1 (Part 2) Cum. Bull. 122	12
Treasury Regulations 111, 26 C. F. R. Sections 29.23(m)-1 (1949)	3
28 U. S. C. Section 1254(1)	2

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958.

No.

GEORGE HUSS,

Petitioner,

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,

Respondent.

No.

RUSSELL HUSS,

Petitioner,

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,

Respondent.

No.

WESLEY HUSS,

Petitioner,

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

George Huss, Russell Huss and Wesley Huss pray that writs of certiorari issue to review the judgments of the

United States Court of Appeals for the Third Circuit entered on March 27, 1958, in three cases, namely, *George Huss v. Francis R. Smith*, *Russell Huss v. Francis R. Smith*, and *Wesley Huss v. Francis R. Smith*, all of which involve identical questions.

OPINIONS BELOW.

The three cases with respect to which writs of certiorari are sought were heard together in the United States District Court for the Eastern District of Pennsylvania, and were consolidated for hearing before the Court of Appeals. The Findings of Fact and Opinion of the District Court (42a) are reported at 150 F. Supp. 224. The Opinion of the Court of Appeals (Appendix B, *infra*, page 18) is reported at 255 F. 2d 599. The Opinion of the Court of Appeals denying petitioners' petition for rehearing (including dissenting Opinion of Hon. Harry E. Kalodner) (Appendix D, *infra* page 25) is reported at 255 F. 2d 601.

The Court of Appeals referred to its Opinion in *Parsons, et al. v. Smith*, (Appendix F, *infra*, page 31), reported at 255 F. 2d 595. The taxpayers in the *Parsons* case have filed a petition for writs of certiorari with this Court.

JURISDICTION.

The judgments of the Court of Appeals, (Appendix C, *infra* pages 22-24) were entered on March 27, 1958. A petition for rehearing, timely filed, was denied on May 29, 1958 (Appendix E, *infra* page 30).

Jurisdiction of this Court is invoked under 28 U. S. C. Section 1254(1).

QUESTION PRESENTED.

Did the taxpayers, who acquired from the owner of certain coal bearing lands exclusive contractual rights to discover and strip mine the coal thereon, have an economic interest in the mineral entitling them to the statutory depletion allowance with respect to the coal mined by them even though (1) taxpayers' contractual rights were regarded by the Court of Appeals as terminable by the owner although not terminated in fact, and (2) taxpayers did not participate in the ultimate sale price of the coal, although they bore the entire risk of discovery and production and depended for their profit upon production of the mineral, which the landowner had agreed to buy at a stated price per ton?

STATUTES AND REGULATIONS INVOLVED.

The statutes involved are Sections 23 (m), and 114 (b)(4) of the Internal Revenue Code of 1939, 26 U. S. C. (1952 ed.) Sections 23 (m) and 114 (b)(4), and the Regulations involved are Treasury Regulations 111, 26 C. F. R. Sections 29.23 (m)-1 (1949). These are printed in Appendix A, *infra* pages 15-17.

STATEMENT OF THE CASE

A. The Facts.

These actions were brought by the petitioners in the United States District Court for the Eastern District of Pennsylvania against the Collector of Internal Revenue pursuant to 28 U. S. C. Section 1340, to recover refunds of income taxes paid with respect to the calendar years 1944 to 1947, inclusive.

In the taxable years involved, petitioners were partners engaged in mining Anthracite by the strip-mine method. From 1944 through 1947 they had income from mining under rights obtained from the Philadelphia and Reading Coal and Iron Company (hereinafter called "Reading") under five written agreements dated May 27, 1944, February 23, 1945, May 8, 1945, July 16, 1945, December 17, 1945, and July 19, 1946. (42a).

Under the terms of these contracts, which were substantially alike, the arrangements were called "salvage" projects. Reading "reserved" specific areas for petitioners, and granted to them the exclusive right to strip all coal which could be discovered in those areas. In each contract, Reading agreed to pay a stated price per ton of coal actually delivered to it. In fixing the contract price, market value was taken into consideration. (Finding of Fact No. 26, 48a). Reading expressly provided against responsibility for discovery of coal or any quantity of coal. Petitioners assumed all risk in connection with prospecting, discovery and recovery of coal and the operation of the entire stripping project, including all tools, materials, power, transportation, labor, and facilities. (36a-37a). Petitioners determined when and where to begin and to stop mining, and whether it would be profitable to begin strip mining. They were not entitled to any payment or to reimbursement of costs if they did not succeed in producing coal. (Finding of Fact No. 17, 46a). Their sole possi-

bility of return was the price per ton which Reading agreed to pay for delivered coal. Petitioners built roads, and commenced stripping operations with equipment of the value of about $100,000; by the end of 1947, they had increased their equipment investment to about $500,000. (Findings of Fact Nos. 18-21, 46a-47a). Most of this equipment was not suitable for other than strip mining (21a).

Each of the contracts contained a provision permitting Reading to terminate on notice (39a). No contract was terminated unilaterally by Reading; however, each was terminated by a written mutual agreement between Reading and petitioners after petitioners completed stripping thereunder (Finding of Fact No. 31, 50a). The termination provisions were inserted to permit Reading to sever relationship with unsatisfactory strip miners without resort to legal proceedings (10a-12a).

B. Decisions of the Courts Below.

The District Court concluded, on the foregoing facts, that petitioners did not have an economic interest in the mineral in place with respect to the coal produced by them in the taxable years because (1) the contracts with Reading were terminable by Reading on thirty days' notice (2) Reading had agreed to pay a stated price per ton of coal delivered, without regard to fluctuation in the market price, and (3) the coal remained an asset of Reading.

The Court of Appeals affirmed the judgments of the District Court. It declared that there was nothing about the method of compensation to suggest that petitioners had acquired an economic interest in the mineral in place. The Court recognized that the parties contemplated such extensive mining as to justify characterization of petitioners' status as involving the requisite economic interest. Indeed, the Court stated that "recent decisions of the Court of Appeals for the Fourth Circuit suggest the reasonableness of such an analysis on facts not very different from those here." Nevertheless, since the Court regarded as "vague"

the standard which must be administered in these cases, it determined that a result contrary to that reached in the Fourth Circuit was justifiable on the ground the matter was within the reasonable discretion of the district judge, citing as an example that the district judge could view the right of termination as more significant than the fact that it was not exercised. The Court further noted that despite the substantial investment of petitioners in equipment, and despite the fact that such equipment had utility for stripping operations only, nothing distinguished such expenditures from ordinary capital expenditures by independent contractors who undertake large projects.

The Court of Appeals denied petitioners' application for rehearing. A dissent was filed by Hon. Harry E. Kalodner. Judge Kalodner pointed out that the petitioners had control over production and depended upon production for the possibility of return on their investment. Accordingly, the specific standard laid down by this Court in its most recent decisions had been met, and the decision of the Court of Appeals in these cases conflicts with the decisions of this Court, with those of the Court of Appeals for the Fourth Circuit, and with a prior decision of the Court of Appeals for the Third Circuit.

C. Petitioners' Position.

This Court only recently, in *Commissioner v. Southwest Exploration Co.*, 350 U. S. 308 (1956) reiterated the standard to be applied in depletion cases: an economic interest in the mineral in place exists where the taxpayer has acquired, by investment, any interest in the mineral in place, and secured by legal relationship income derived from the extraction of the mineral, to which he must look for a return of his capital. As stated in *Burton-Sutton Oil Co., Inc. v. Commissioner,* 328 U. S. 25, 34 (1946), a taxpayer has an economic interest in the mineral in place through control over extraction, and depletion depends upon production.

Petitioners had the exclusive right to extract the coal in the areas specified; they bore the risk of discovery and production; they actually produced the mineral and had income therefrom; and they were dependent solely upon production for their possibility of return. It is petitioners' position that they have met exactly the requirements specified by this Court for entitlement to the depletion allowance, and that they satisfy the intended objective of the statutory allowance: to compensate those who bear the risk of discovery of the mineral.

The Court of Appeals was in error in determining that the standard involved was vague, and that the undisputed facts presented an area in which different conclusions may properly be reached on the same facts. It was further in error in extending the requirement of dependence upon production to include the risk of fluctuation with the market, in holding that the possibility of termination of petitioners' contracts was a relevant consideration in the taxable years, and in suggesting the absence of a "capital investment" by petitioners in the mineral deposit. On substantially similar facts, the Court of Appeals for the Fourth Circuit allowed the depletion deduction to the strip miner. In this, the Fourth Circuit was correct and consistent with the determinations of this Court. The same result should have been reached here.

REASONS FOR GRANTING THE WRITS.

1. The Decision of the Court of Appeals Is in Conflict With the Decisions of this Court.

Only recently this Court was constrained to meet the problem of entitlement to the depletion allowance under 28 U. S. C. Sections 23(m) and 114(b)(4). *Commissioner v. Southwest Exploration Co.*, 350 U. S. 308 (1956). The issue was resolved upon a reaffirmation of principles expressed in *Burton-Sutton Oil Co. v. Commissioner*, 328 U. S. 25 (1946); *Kirby Petroleum Co. v. Commissioner*, 326 U. S. 599 (1946); and *Palmer v. Bender*, 287 U. S. 551 (1933).

Despite the unequivocal expression of principles and the clear direction as to their application contained in the *Southwest Exploration* decision, the Court of Appeals stated that the standard to be applied was vague, and concluded that the matter was one for the reasonable discretion of the trial court, although this would, and did, lead to differing tax results upon substantially similar facts.

This Court in the *Southwest Exploration Co.* case declared that a taxpayer has an economic interest in the mineral in place, the prerequisite to the statutory depletion allowance, where he has (1) acquired, by investment, any interest in the mineral in place, and (2) secured by legal relationship income derived from the extraction of the oil, to which he must look for a return of his capital. This basic principle, as applied in the *Southwest Exploration Co.* case, in *Burton-Sutton Oil Company*, and in *Palmer v. Bender* does not permit the conclusion that economic interest is a composite of indefinite and inexplicable vagaries, to be resolved by the weight accorded to a host of circumstances by the district judge. Even in the complicated situations involving oil leases, this Court never rested its determinations upon the purely legal reactions of the lower tribunals to the undisputed facts.

In the instant cases, the petitioners acquired the exclusive right to strip mine the reserved or leased areas.

They assumed all expenses and liabilities incident to discovery and production. They were not entitled to any compensation or reimbursement of expenses in the event they failed to discover and produce merchantable coal. And under the terms of contract between petitioners and Reading, the latter agreed to pay a stated price per ton for coal produced by petitioners. This constituted petitioners' sole source of income from production, and their sole return upon their investment.

These facts leave no room for discretionary decisions. The Court of Appeals disregarded the two fundamental rules for the statutory depletion deduction as declared by this Court, and gave decisive consideration to extraneous circumstances to reach its result.

As to the first of the two requirements specified by this Court, the Court of Appeals failed to recognize that the "investment" to which this Court referred in its decisions is synonymous with "economic interest." This is evident from *Burton-Sutton Oil Company v. Commissioner*, 328 U. S., at pages 29, 32, 34, wherein this Court pointed out that the requisite investment may be acquired through gaining a share in the control over extraction or the right of production of the mineral in place. Indeed, in *Commissioner v. Southwest Exploration Co.*, 350 U. S., at page 312, this Court expressly stated that no money need actually be invested in the deposit. Petitioners, as lessees, clearly had a capital investment in the mineral in place. The Court of Appeals failed to recognize that, since depletion depends upon production, such interest could not be affected by the fact that the interest might have been terminated.[1]

Further, the Court of Appeals, misconceived the second of the two rules specified by this Court insofar as it insisted that the petitioners should have shared the risk of the ultimate market. Petitioners were solely dependent upon

1. In the *Southwest Exploration Co.* case, the lower courts expressly noted the fact that the arrangements with the upland owners, to whom this Court allowed the depletion deduction, were terminable at any time. 220 F. 2d 58, 62 (9th Cir. 1955).

extraction for their return and they received only a stated price per ton for coal produced. This complies with all that is necessary for the depletion deduction under this Court's decisions.

Having met the requirements laid down by this Court, the petitioners were entitled to the depletion deduction. Only through ignoring the rules declared by this Court was the Court of Appeals able to reach a different result.

2. The Decision of the Court of Appeals Is in Conflict With the Decisions of the Court of Appeals for the Fourth Circuit.

The Fourth Circuit Court of Appeals has expressly held, in strip mining cases, that the existence of an option to terminate, and the fact that the strip miner's income was derived from the agreement of the owner to pay a stated price per ton of coal extracted and delivered, do not operate to deprive the strip miner of the depletion deduction. First, that Court determined that the significant fact was the extraction pursuant to an exclusive right during the existence of that right. Second, that Court regarded it as sufficient that the strip miner depended completely upon extraction for his income. Third, that Court did not hesitate to conclude that the strip miner had a capital interest in the mineral deposit. *Weirton Ice and Coal Co. v. Commissioner,* 231 F. 2d 531 (1956); *Commissioner v. Hamill Coal Corp.,* 239 F. 2d 347 (1956); and see also, *Commissioner v. Gregory Run Coal Co.,* 212 F. 2d 52 (1954), cert. denied 348 U. S. 828.

In each respect, the decision sought to be reviewed is directly in conflict with the decisions of the Fourth Circuit.[2] The Court of Appeals for the Third Circuit noted this itself:

---

2. With respect to the fact that the strip miner has a contract right to receive a stated price per ton, the decision in the instant cases is also at variance with the prior decision of the Third Circuit Court of Appeals in *Commissioner v. Mammoth Coal Co.,* 229 F. 2d 535, 538 (1955), cert. denied 325 U. S. 824.

"there is more basis for argument here . . . that the bargain contemplated such extensive mining of the area as would warrant characterization of the stripper's status as involving an interest in the mineral in place. Indeed, certain recent decisions of the Court of Appeals for the Fourth Circuit suggest the reasonableness of such an analysis on facts not very different from those here." (Appendix B, *infra*, page 20; 255 F. 2d, at pages 600-601.)

As already indicated, the Third Circuit Court of Appeals attempted to justify its contrary conclusion on the ground that the problem was within the area of reasonable discretion on the part of the district judge. It is respectfully submitted that only legal conclusions are involved in these cases, and these are for the court of last resort. But even in this explanation, the Third Circuit is in conflict with the Fourth Circuit (as well as with this Court) since the Fourth Circuit, in each case, reversed the lower court.

Reference is made to the dissenting opinion of Judge Kalodner (Appendix D, *infra* page 26), wherein the conflict between the two circuits is fully demonstrated.

Petitioners urge that the determination of the Court of Appeals for the Fourth Circuit in the *Weirton* and *Hamill* cases and the dissent of Judge Kalodner in this case are correct and in accord with the basic requirements for the depletion deduction specified by this Court. The option to terminate does not affect the right or control over production unless and until it is exercised. Plainly, in the taxable years the petitioners had gross income from mining, and had an interest in the mineral in place. Depletion depends upon production, and not upon cost, or value, or life of the economic interest involved. The depletion deduction is measured by gross income; consequently, the petitioners' right thereto does not result in the reaping of tax benefits beyond the exercise of their mining rights. To allow depletion to petitioners is consistent with the Congressional

intent to benefit the discoverer-producer, so long as he produces. See Sen. Rep. No. 617, 65th Cong. 3d Sess., 1939-1 (Part 2) Cum. Bull. 122; H. R. Rep. No. 1, 69th Cong. 1st Sess., p. 6, 1939-1 (Part 2) Cum. Bull. 319; 67 Cong. Rec. 3561-78.

Similarly, since petitioners' income was dependent exclusively upon extraction, the Fourth Circuit was clearly correct in holding that there was no further requirement that they assume the fluctation of the market. Indeed, there is no apparent reason for holding that petitioners, whose risks in the project were already burdensome, should not protect themselves by taking advantage of an assured customer and price.

It is respectfully submitted that the two Circuits are in direct conflict, and that this conflict can be resolved only by this Court.

3. The Issues Presented Are Significant to the Development of the Revenue Laws and to the Mining Industry.

This Court has not yet applied the depletion provisions of the Internal Revenue laws to the coal strip mining industry. The problems of strip mining coal, and the relationship between owner and strip miner are unusual. The issues, however, will continue to arise, since the 1954 Code perpetuates the 1939 Code in this respect. 26 U. S. C. Sections 611 (a), 613.

The decision of the Court of Appeals in the instant cases adopts a new concept, i.e., the reasonable discretion of the district court in the first instance, which by its own terms permits different tax results upon similar facts. The danger of this approach lies in the utter lack of uniformity which it condones; both taxpayers and the Internal Revenue Service are deprived of proper guidance enabling prompt collection of the revenue and the determination of liability therefor.

It is urged that this Court has not regarded, and does not regard, the applicable criteria in this class of case to be too vague. The bromide, that each case depends upon

its own facts, as Judge Kalodner pointed out in his dissent, does not excuse the application of the principles clearly and concisely expressed by this Court.

It is urged that the Court of Appeals for the Third Circuit committed error which puts it in conflict with the Fourth Circuit and with this Court. The only remedy remaining is that which petitioners here seek.

CONCLUSION.

The Court of Appeals has, in this instance, declared a policy fundamentally different from that followed by this Court, and unsettles the entire area involved under the depletion statute. In addition, it has, in conflict with the Fourth Circuit, deprived petitioners of the depletion deduction, despite the fact that they have met all requirements hitherto pertaining, because (1) their interest in the mineral in place was terminable, (2) they did not assume the risk of market fluctuations, and (3) their equipment was suitable for other strip mining operations and subject to depreciation. These reasons are the result of confusion, which requires the clarifying deposition of this Court, for the benefit of the uniform administration of the revenue laws.

For these reasons, petitioners respectfully submit that their Petition for Writs of Certiorari should be granted.

Respectfully submitted,

WALTER STEIN,
1220 Philadelphia Saving Fund Bldg.,
12 South 12th St.,
Philadelphia 7, Pa.,
LEON H. KLINE,
Attorneys for Petitioners.

Of Counsel:

BERGER AND GELMAN,
1220 Philadelphia Saving Fund Bldg.,
12 South 12th St.,
Philadelphia 7, Pa.

APPENDIX A.

INTERNAL REVENUE CODE OF 1939.

SEC. 23. **Deductions from gross income.** In computing net income there shall be allowed as deductions:

* * *

(m) **Depletion.** In the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements, according to the peculiar conditions in each case; such reasonable allowance in all cases to be made under rules and regulations to be prescribed by the Commissioner, with the approval of the Secretary. * * * In the case of leases the deduction shall be equitably apportioned between the lessor and lessee. * * *

(n) **Basis for depreciation and depletion.** The basis upon which depletion, exhaustion, wear and tear, and obsolescence are to be allowed in respect of any property shall be as provided in section 114.

(26 U. S. C., 1952 ed., Sec. 23.)

* * *

SEC. 114. **Basis for Depreciation and Depletion.**

* * *

(b) **Basis for Depletion.**

* * *

(4) [As amended by Sec. 145(a), Revenue Act of 1942, c. 619, 56 Stat. 798, and Sec. 124(a) and (c), Revenue Act of 1943, c. 63, 58 Stat. 21] **Percentage depletion for coal** * * *

(A) **In General.** The allowance for depletion under section 23(m) shall be, in the case of coal mines, 5 per centum * * * of the gross income

from the property during the taxable year, excluding from such gross income an amount equal to any rents or royalties paid or incurred by the taxpayer in respect of the property. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property * * *.

(B) **Definition of Gross Income From Property.** As used in this paragraph the term "gross income from the property" means the gross income from mining. The term "mining", as used herein, shall be considered to include not merely the extraction of the ores or minerals from the ground but also the ordinary treatment processes normally applied by mine owners or operators in order to obtain the commercially marketable mineral product or products. The term "ordinary treatment processes", as used herein, shall include the following: (i) In the case of coal—cleaning, breaking, sizing, and loading for shipment; * * *

(26 U. S. C. 1952 ed., Sec. 114.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.23(m)-1. **Depletion of Mines, Oil and Gas Wells, Other Natural Deposits, and Timber; Depreciation of Improvements.**—Section 23(m) provides that there shall be allowed as a deduction in computing net income in the case of mines, oil and gas wells, other natural deposits, and timber, a reasonable allowance for depletion and for depreciation of improvements. Section 114 prescribes the bases upon which depreciation and depletion are to be allowed.

Under such provisions, the owner of an economic interest in mineral deposits or standing timber is allowed an-

nual depletion deductions. An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production. Thus, an agreement between the owner of an economic interest and another entitling the latter to purchase the product upon production or to share in the net income derived from the interest of such owner does not convey a depletable economic interest.

• • •

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,315
No. 12,317
No. 12,319

GEORGE HUSS,
Appellant in No. 12,315

RUSSELL HUSS,
Appellant in No. 12,317

WESLEY HUSS,
Appellant in No. 12,319

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1957

Before: BIGGS, *Chief Judge;* and GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 27, 1958)

HASTIE, *Circuit Judge.*

These appeals, like those we have decided today in *Parsons v. Smith,* F.2d , challenge a district court

ruling that a contracting firm which extracted coal from the land of another by strip mining was not entitled to claim a percentage depletion allowance in computing its income from that mining operation. Therefore, we will not repeat such of our discussion in *Parsons v. Smith* as presents legal conceptions common to all cases of this type. However, the controversies involve different arrangements between different parties concerning different tracts. And circumstances peculiar to a particular stripping arrangement may be decisive for or against the claimed depletion deduction. Therefore it is necessary to consider separately and in some detail the facts upon which the stripper relies in this case.

The present contractor, a partnership which we shall call Huss, entered into a written agreement with the Philadelphia and Reading Coal and Iron Co., hereinafter called Reading, concerning the strip mining of certain coal lands owned by Reading. For this work Huss was to be paid an agreed dollar amount per ton of usable ore it should extract and deliver to a colliery designated by Reading. The agreed price was described in the contract as "full compensation for the full performance of all work and for the furnishing of all material, labor, power, tools, machinery, implements and equipment required for the work". The provisions of this contract which relate to compensation are certainly no more favorable to the taxpayers' depletion claim than were the rather similar provisions in the *Parsons* case. In neither case does anything agreed or done about compensation suggest that the stripper acquired an interest in the mineral in place.

On the other hand the facts relating to the duration of the stripping agreement in this case are somewhat different from those in the *Parsons* case. Huss continued to mine the contract area until the parties mutually agreed that additional stripping would not be profitable. In this sense Huss did mine the deposit to exhaustion. However, the stripping contract expressly provided that Reading

could cancel the agreement, terminating it unconditionally and without liability, on thirty days notice in writing. We are not told the reason for including this cancellation clause. We know only that it was part of the contract and that it was not invoked during the course of the mining operation under the contract.

In these circumstances there is more basis for argument here than there was in the *Parsons* case that the bargain contemplated such extensive mining of the area as would warrant characterization of the stripper's status as involving an interest in the mineral in place. Indeed, certain recent decisions of the Court of Appeals for the Fourth Circuit suggest the reasonableness of such an analysis on facts not very different from those here. See *Commissioner of Internal Revenue v. Hamill Coal Corp.*, 1956, 239 F.2d 347; *Weirton Ice & Coal Supply Co. v. Commissioner of Internal Revenue*, 1956, 231 F.2d 531. But to us the most that can be said for the stripper's position on the present record is that reasonable men can differ on the inferences they draw from the facts and in the relative values they attribute to various facts in determining the category in which the total situation belongs. Indeed, this contract did not give the stripper the privilege of mining all uncovered coal after notice of termination, which in the *Parsons* case was thought to strengthen the stripper's claim to an interest in the mineral in place. Certainly a reasonable trial judge could view the absolute right of termination on thirty days notice as more significant than the fact that this privilege was not exercised in the given case. And this in substance is what the trial judge did. We cannot find reversible error in this evaluation of the evidence in relation to the rather vague standard the courts must administer in these cases.

Finally, we note that Huss invested a considerably larger sum than did the plaintiffs in the *Parsons* case in drilling and earth moving equipment. At one time Huss committed about $500,000 worth of equipment to this job.

However, the district court found that, except for one item, all of this equipment had utility for stripping operations in general rather than special adaptation to this project. Nothing appears which distinguishes such expenditures from capital expenditures normally made by independent contractors who undertake large projects in such familiar fields as road building and general construction.

We are satisfied that the conclusion of the district court was consistent with the rational application of the legal standards stated in the statute and the implementing Treasury Regulations to the facts at hand. That is enough to require affirmance.

A separate issue is raised on this appeal with reference to so much of the judgment below as denied appellants any depletion allowance for strip mining prior to December 31, 1944 under certain other agreements called the "Stevens contracts". This ruling was explicitly based upon the trial court's conclusion that the taxpayers, who as plaintiffs below had the burden of proof, had failed to establish the existence prior to 1945 of such an agreement as would support a depletion allowance. We have examined the evidence on this branch of the case. It is not so clear and convincing as necessarily to persuade any reasonable trier of fact. We must, therefore, sustain the trial court's finding against the appellants on the facts.

The judgment will be affirmed.

APPENDIX C.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12315 (D.C. No. 14775)

GEORGE HUSS
Appellant

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge* and GOODRICH and HASTIE, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 27, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12317 (D.C. 14776)

RUSSELL HUSS,
Appellant

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge* and GOODRICH and HASTIE, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 27, 1958

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12319 (D.C. 14777)

WESLEY HUSS,
Appellant

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge* and GOODRICH and HASTIE, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

March 27, 1958

APPENDIX D.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,315
No. 12,317
No. 12,319

GEORGE HUSS,
Appellant in No. 12,315
RUSSELL HUSS,
Appellant in No. 12,317
WESLEY HUSS,
Appellant in No. 12,319

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA.

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge;* and MARIS, GOODRICH, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed May 29, 1958)

PER CURIAM:

The petition for rehearing considered, we adhere to our view that the record affords adequate basis for the con-

clusion of the trial court that the stripper did not have a depletable interest in the mineral in place. It is strongly urged in the present petition that decisions of the Court of Appeals for the Fourth Circuit, cited and discussed in our opinion on this appeal, reach a contrary result on very similar facts. We are not sure what that Court of Appeals would do in reviewing a decision against the stripper on the facts of our case. But regardless of that, we are still persuaded that an affirmance is proper.

The petition will be denied.

KALODNER, *Circuit Judge*, dissenting

I would grant the petition for rehearing. Further, on rehearing I would reverse the judgment of the district court on the principal issue involved—the existence of an economic interest.

The Supreme Court has charted the course and the law in cases of this type. Only recently it stated, firmly and concisely, that a taxpayer is entitled to the depletion deduction "where he has: (1) 'acquired, by investment, any interest in the oil in place', and (2) secured by legal relationship 'income derived from the extraction of the oil, to which he must look for a return of his capital'". Commissioner v. Southwest Exploration Co., 350 U. S. 308, 314 (1956).

"These two factors usually considered together", said the Supreme Court in the Southwest Exploration case, "constitute the requirement of 'an economic interest.'"

Nothing was said by the Supreme Court in that case on the score as to the impact of a right of termination of a contract creating an economic interest on the existence of that interest in the first place. Nor has the Supreme Court said so in any other case. We did not consider nor did we pass upon this question in Commissioner v. Mammoth Coal, 229 F.2d 255 (1955). Nor has any other appellate court done so except the Fourth Circuit. That Circuit, however, has explicitly ruled that a right of termination does not destroy an economic interest which existed prior to its exercise. It

did so in two cases: Weirton Ice and Coal Supply Co. v. Commissioner, 231 F.2d 531, 533 (1956) and Commissioner v. Hamill Coal Corp., 239 F.2d 347 (1956).

In Weirton it was said (p. 535):

"It is of no moment that the owner of the mineral, as in other cases in which the right of an extractor to a deduction for depletion has been upheld, had the option to terminate the arrangement at any time, for as the event proved, Weirton actually mined the coal during all the taxable years."

In Hamill, the contract (entered into in 1944) was to continue for one year and from year to year thereafter with the right of either party to terminate it at any time upon 90 days' written notice. The contract was terminated in 1947 by mutual agreement "after Daniel [the stripper] had removed substantially all the coal with an overburden of less than 40 feet." (p. 349).

In Weirton the decision does not disclose when mining operation ceased or whether the stripper ever mined to exhaustion. In Hamill, however, the record discloses that subsequent to termination the owner of the mine actually mined some 90,000 tons of coal.

In the instant case it is undisputed that the stripper (taxpayers) mined to exhaustion and that the contracts were terminated by mutual agreement after such exhaustion so that the factual situation here is much stronger than in either Weirton or Hamill.

I agree with the view of the Fourth Circuit that the right of termination does not affect a stripper's right to depletion where the requisite economic interest as defined by the Supreme Court exists. The Commissioner and the courts must deal with a situation as it exists during the taxable year involved and not as it might exist in some future year because of the possible occurrence of an event through the exercise of a contractual right.

It is not necessary, however, that I go as far along the course stated in the decision of the instant case. The record here discloses that the termination clause was included in the contract as a precaution on the part of the owner to protect itself from possible difficulties with an incompetent stripper.[1] It may be noted parenthetically that in the opinion sought to be reconsidered it was erroneously stated "We are not told the reason for including this cancellation clause."

Assuredly, prior to the exercise of the termination clause, taxpayers here "had an economic interest in the oil [coal] in place through its [their] control over extraction." Burton-Sutton Oil Co., Inc. v. Commissioner, 328 U.S. 25, 34 (1946). That control, moreover, actually existed, as already said, until the property was mined to exhaustion. Further, as stated in Burton-Sutton Oil Co. "Depletion depends only upon production".

It is the possibility of profit from the use of rights over production dependent upon the extraction of the mineral which marks an economic interest. No money need be invested in the mineral deposit. Commissioner v. Southwest Exploration Co., 350 U.S., at page 312.

There is no room for doubt that the taxpayers had the requisite control over production, for under the contracts, the Coal Company gave to taxpayers the exclusive right to mine all of the merchantable coal in place in the leased area. That such right might have been brought to an end does not affect the present fact that the economic interest existed.

There is also no room for doubt that the taxpayers depended solely upon production for their return, since they received only the agreed price per ton for coal produced and delivered. Indeed, they bore all risks of mining, including,

---

1. Russell Huss testified (p. 60 N. T.) that the termination clause "was put in there in a form contract so as if they got hold of a contractor who was not reputable, who wouldn't live up to the contract, they could put him off the property without court action."

but not limited to, the finding and production of commercial quality coal in such quantities necessary to make operation profitable.

Until now, every appellate decision in this type of case, including our own decision in Commissioner v. Mammoth Coal Co., supra, has held that there is no requirement that the stripper must assume the risks of the ultimate market. To the extent that we now hold otherwise, we are in conflict with our decision in that case and with the decisions of the Fourth Circuit. We are also in conflict with the latest pronouncement of the Supreme Court, Commissioner v. Southwest Exploration Co., 350 U.S. at page 314, that the taxpayer must look solely to the extraction of the mineral for his return. That is what the taxpayers here had to do.

Although we said, in Commissioner v. Mammoth Coal Co., 229 F.2d at page 537, that "The facts in each case determine the result", I do not regard such declaration as an admission that the criteria to be applied are too vague to do so on other than the basis of "the reasonable man". To the facts must be applied statute and the specific rules pronounced by the Supreme Court in the interpretation of it. That is the teaching of Commissioner v. Southwest Exploration Co., supra.

I conclude, therefore, that the taxpayers during the taxable years involved had the requisite economic interest in the coal in place. This, to me, is the result required by the decisions of the Supreme Court, the Fourth Circuit, and this Court; and our present decision is inconsistent therewith.

Accordingly, I would grant rehearing and reverse the judgments of the district court.

APPENDIX E.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 12,315, 12,317 and 12,319

GEORGE HUSS,
Appellant in No. 12,315

RUSSELL HUSS,
Appellant in No. 12,317

WESLEY HUSS,
Appellant in No. 12,319

v.

FRANCIS R. SMITH, COLLECTOR OF INTERNAL REVENUE, FIRST DISTRICT OF PENNSYLVANIA

SUR PETITION FOR REHEARING

Present: BIGGS, *Chief Judge;* and MARIS, GOODRICH, STALEY and HASTIE, *Circuit Judges.*

After due consideration the petition for rehearing in the above-entitled cases is hereby denied.

Attest:

IDA O. CRESKOFF
Clerk

Dated: May 29, 1958

APPENDIX F.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,299
No. 12,300
No. 12,301

EMORY W. PARSONS and ERMA M. PARSONS,
Appellants in No. 12,299

HOWARD H. PARSONS and MARTHA PARSONS,
Appellants in No. 12,300

LAWRENCE H. PARSONS and GRACE E. PARSONS,
Appellants in No. 12,301

v.

FRANCIS R. SMITH, FORMER COLLECTOR OF INTERNAL REVENUE FOR THE FIRST DISTRICT OF PENNSYLVANIA

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1957

Before: BIGGS, *Chief Judge;* and GOODRICH and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed March 27, 1958)

HASTIE, *Circuit Judge.*

These are appeals by taxpayers, who are partners in a business, from a judgment of the district court denying

their several claims for refunds of income taxes paid upon their respective distributable shares of certain partnership income derived from coal mining. The appellants can prevail only if the involvement of the partnership, hereinafter called Parsons, in a strip mining enterprise was such as to entitle the partners to deduct a depletion allowance, pursuant to Sections 23 (m) and 114 (b) of the Internal Revenue Code of 1939 as implemented by Treasury Regulation 111, § 29.23 (m)-1, 26 CODE FED. REG., 1949 ed., § 29.23 (m)-1, in computing partnership income from the mining operation. The problem presented is the often difficult, though familiar and recurring one of determining whether the person claiming a depletion allowance is "the owner of an economic interest in mineral deposits" within the meaning of Treasury Regulation 111, § 29.23 (m)-1.[1]

The almost simultaneous recent decisions of this court in *Commissioner of Internal Revenue v. Mammoth Coal Co.*, 1955, 299 F.2d 535, cert. denied 352 U.S. 824, and of the Court of Appeals for the Ninth Circuit in *Usibelli v. Commissioner of Internal Revenue*, 1955, 229 F.2d 539, have gone so thoroughly into this tax problem as it arises in the context of strip mining that we shall not elaborate again the basic concepts which are discussed in those cases. It is enough to repeat that the decisions make it clear that the economic interest in coal in place which will support a percentage depletion allowance for strip mining need not

1. ". . . .

"Under such provisions [Secs. 23 (m) and 114], the owner of an economic interest in mineral deposits or standing timber is allowed annual depletion deductions. . . . An economic interest is possessed in every case in which the taxpayer has acquired, by investment, any interest in mineral in place or standing timber and secures, by any form of legal relationship, income derived from the severance and sale of the mineral or timber, to which he must look for a return of his capital. But a person who has no capital investment in the mineral deposit or standing timber does not possess an economic interest merely because, through a contractual relation to the owner, he possesses a mere economic advantage derived from production." 26 CODE FED. REG., 1949 ed., § 29.23 (m)-1.

amount to an estate or tenancy as understood in the law of real property. Yet, it must be something more than an independent contractor's normal right to the benefit of his bargain and the kind of "interest" which that right always gives him in the subject matter of the contract. In characterizing an asserted interest a court will be guided by the total picture revealed by the facts of the case at hand.

On this appeal the facts found by the district court are unchallenged. The Parsons firm is a contractor and over the years has engaged in road building, strip mining and the drilling of gas wells. Parsons derived the income involved in this case from strip mining conducted on land owned by the Rockhill Coal Co.

In preliminary negotiations Rockhill had proposed that Parsons undertake extensive stripping of the area in question under a detailed written contract and, to that end, Rockhill actually drafted a proposed contract. But Parsons refused to sign the agreement stating that it did not wish to be bound to a long term performance because, if opportunity should arise, it wished to return to road building. Accordingly, it was agreed that the partnership would proceed with stripping in the designated area under a terminable oral agreement. The essential provisions of that oral contract are set out in the trial findings.

The agreement defined the area to be mined but left the partnership free to work as it chose. The partnership understood that it was not obligated to mine the tract to exhaustion. Indeed, although operations under the oral agreement were conducted from time to time over an eight year period, the tract still contained much strippable coal when Parsons terminated its operations. Some of this coal was later mined by another contractor. Moreover, it was mutually understood from the beginning, in the light of the already mentioned desire of the partnership to be free to change from stripping to road building on short notice, that either party could terminate the oral agreement on ten

days notice. In this connection it was understood that after notice of termination by the landowner the partnership would still be privileged to remove and the landowner obligated to accept usable coal from which the partnership had actually removed the overburden—this constituting the major part of the stripping operation—before the notice was received.

It was agreed that the partnership should deliver the coal it mined to Rockhill's railroad cars and to no one else. In practice any coal which Rockhill rejected as unsuitable for its purposes was left in the pits as unsalable. The parties agreed in advance upon a stipulated price per ton which Rockhill was to pay Parsons for usable coal. This price was not geared to and did not vary with the market price of coal. However, the price could be and on occasion was altered to reflect increased costs of production.

Parsons made a considerable investment in movable equipment used in the Rockhill stripping operation. Early in the taxable period the partnership committed to this job its own equipment valued at some $210,000. At the same time it was using about $130,000 worth of Rockhill equipment under a rental agreement with the landowner. As the work progressed the partnership rented an increasing amount of Rockhill equipment and used less of its own. There is no indication that the partnership equipment had utility only for this job or was specially adapted to it.

We are satisfied that what the parties agreed and what they did disclose the partnership acting only as an ordinary independent contractor in mining the Rockhill tract. First, the matter of compensation was handled as in an ordinary contract job. The partnership had no freedom to sell or dispose of the coal to its own account. It was entitled only to an agreed price from the owner of the mining property. And since that price did not fluctuate with the market, there is nothing about the scheme of payment to indicate any interest of the contractor in the mineral. If we ask how this arrangement for payment to the

partnership for its work differed from the normal payment to an independent contractor for accomplishing an agreed result, it is immediately apparent that there is no significant difference.

The other important factor on this record is the agreed duration of the enterprise. Here it is noteworthy that the partnership did not enter the job with any understanding that it would mine the tract to exhaustion, and that it did not in fact do so. Rather, it was concerned from the beginning to remain free to discontinue stripping at any time. The terminability of the agreement on short notice was an essential and significant part of the bargain, not a mere formality inserted by some cautious draftsman. The logical conclusion from all of this is that the partnership contemplated and bargained for no economic interest in the mineral it agreed to extract beyond the independent contractor's normal concern with any subject matter with which he is to work for an agreed price. True, the ten day notice could not be used to deprive Parsons of compensation for work it already had done in removing the overburden from particular coal. But this special limited right to complete work already far advanced does not destroy the character of the contract as one deliberately made terminable on very short notice.

The cases support this view of the matter. While the courts characteristically look at the entire context in deciding whether mining contractors have depletable interests in the mineral in place, the stripper usually bases his claim upon one or both of the factors discussed above. In some circumstances the stripper's right to mine the deposit to exhaustion, or even for a rather considerable period without particular reference to exhaustion, is stressed. See *Commissioner of Internal Revenue v. Mammoth Coal Co., supra*; *Stilwell v. United States*, 4th Cir., 1957, 250 F.2d 736; *Winfield Mining & Contracting Co.*, 1954, 13 TCM 571; *James Ruston*, 1952, 19 T.C. 284; *cf.* G.C.M. 26290, 1950-1 CUM. BULL. 42. In others the fact that the stripper's in-

come from the mining operation varies in accordance with the market price of the mineral makes his claim of depletable interest persuasive. See *Commissioner of Internal Revenue v. Gregory Run Coal Co.*, 4th Cir. 1954, 212 F.2d 52, *cert. denied*, 348 U.S. 828 (Vincent-Swaney contract); *Virginia B. Coal Co.*, 1956, 25 T.C. 899; *Paul E. Barry, Inc.*, 1955, 14 TCM 37; *Winfield Mining & Contracting Co., supra*; *James Ruston, supra.* But see *C. A. Hughes & Co.*, 1955, 14 TCM 172. But unless some such special circumstance appears, differentiating the arrangement from the ordinary contract job, there is analytically no basis upon which the stripper, who has no conventional property in the mineral, can claim a depletable interest therein.

Appellants attach much significance to recent borderline cases in which the Court of Appeals for the Fourth Circuit has found that contractors engaged in strip mining on land of others were entitled to depletion allowances. See *Stilwell v. United States, supra*; *Commissioner of Internal Revenue v. Gregory Run Coal Co. supra*; *Weirton Ice & Coal Supply Co. v. Commissioner of Internal Revenue*, 4th Cir. 1956, 231 F.2d 531; *Commissioner of Internal Revenue v. Hamill Coal Corp.*, 4th Cir. 1956, 239 F.2d 347. That court has certainly gone as far as any other in recognizing depletable interests in strippers. But in the cited Fourth Circuit decisions we find repeated emphasis upon the court's factual conclusion that the real understanding of the parties was that the strip miners would be allowed to exhaust the mineral, or at least to continue stripping operations for a very substantial time. Only in one of the arrangements considered in *Commissioner of Internal Revenue v. Gregory Run Coal Co., supra*, does this factor seem to have been absent. And there the owner and the strip miner had formalized their relationship in an agreement terming the strip mining project "this joint adventure." How much weight the court accorded this indication of the way the parties themselves viewed their relationship, we do not know. Perhaps no more can be said than that distin-

guishing facts usually prevent reasoning by analogy from being very helpful in borderline cases. In any event, we think the reasoning of the Fourth Circuit cases requires the stripper to marshal more significant indicia of interest in the mineral than the present record will yield.

One other point deserves separate mention. In these mining cases the allowance of a percentage depletion deduction from gross income for tax purposes is premised on the conception that a tax free recovery of capital actually invested in a wasting mineral deposit is fair. See *Commissioner of Internal Revenue v. Southwest Exploration Co.*, 1956, 350 U.S. 308, 312. The commitment of capital as an investment in the exploitation of a given mineral deposit must be real and unequivocal. Otherwise, mining contractors, like contractors generally, must look to "receive their tax benefit through depreciation and obsolescence allowances, and not through an allowance for the depletion of the mineral deposit on which they happen to be working." See *Usibelli v. Commissioner of Internal Revenue*, *supra*, 229 F.2d at 541.

Here the only thing set up as a capital investment in the Rockhill coal deposits is Parsons' purchase of a considerable quantity of movable equipment, accompanied by the rental of other equipment from Rockhill. There has been no showing that this equipment was specially adapted to this job or that it would not be suitable thereafter for such other undertakings as constituted the normal and familiar business of this contractor. Thus, quite apart from considerations relating to compensation and the terminability of the contract, it is very doubtful whether investment in equipment of general utility in a contractor's business is the type of capital expenditure which can properly be found to constitute an investment in a particular mineral deposit which the contractor has undertaken to work.

For these reasons we agree with the district court that the tax refund claims in suit are not well founded.

The judgment will be affirmed.

OPINION OF THE COURT OF APPEALS ON PETITION FOR REHEARING.

Present: BIGGS, *Chief Judge*; and MARIS, GOODRICH, STALEY and HASTIE, *Circuit Judges*.

PER CURIAM:

This petition for rehearing raises no point of substance that has not already been considered and decided against the petitioner. Accordingly, the petition is denied.

KALODNER, *Circuit Judge*, dissenting.

I am of the opinion that a rehearing should be granted and the judgment of the district court reversed.

This result is required for the reasons I have given in my dissenting opinion in the Huss cases.

The taxpayers here, as in the Huss cases, were granted an exclusive right to remove all the merchantable coal in place in the reserved or leased area. They had a right of control over production of the mineral in place which gives rise to the economic interest necessary for the depletion allowance. Burton-Sutton Oil Co. v. Commissioner, 328 U.S. 25, 29, 32 (1946). All the coal involved was produced during the existence of this interest. The fact that such interest might have been brought to an end some day in the future is not a relevant consideration.